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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 33 M.D. 2024

DAVID H. ZIMMERMAN and KATHY L. RAPP,

Petitioners,

v.

AL SCHMIDT, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, the COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, *et al.*,

Respondents.

PETITIONERS' BRIEF IN SUPPORT OF APPLICATION FOR SUMMARY RELIEF

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I. PRELIMINARY STATEMENT

Petitioners David H. Zimmerman and Kathy L. Rapp are currently serving as elected representatives of the Pennsylvania House of Representatives and intend to seek reelection in 2024. They commenced this action by way of a Petition for Review ("PFR"), seeking declaratory and injunctive relief to restore the supremacy of the mandate in Article VII, Section 14 of the Pennsylvania Constitution, which plainly requires that absentee votes be delivered to and canvassed in the election districts (precincts) in which the absentee voters respectively reside.[1]

After more than 50 years of complying with this constitutional mandate, the Pennsylvania General Assembly suddenly disregarded it starting in 2019. Contrary to the plain and unambiguous language of Article VII, Section 14, two provisions of the Pennsylvania Election Code ("Election Code"),[2] namely 25 Pa.Stat. §§ 3146.6 and 3146.8, the official guidance issued by Respondent Department of State, and/or the practice and policy that has been adopted by each of the 67 Counties in Pennsylvania now dictate that absentee votes must be delivered to and canvassed on a county-wide basis at the offices of the relevant county boards of elections. Accordingly, Petitioners requested an order declaring 25 Pa.Stat. § 3146.6 and 25

[1] "The Legislature shall, by general law, provide a manner in which, and the time and place at which, [qualified absentee electors] may vote, and for the return and canvass of their votes in the election district in which they respectively reside." Pa. Const. Art. VII, § 14(a) (emphasis added).

[2] Act of June 3, 1937, P.L. 1333, as amended, 25 Pa.Stat. §§ 2600-3591.

Pa.Stat. § 3146.8 unconstitutional on their face and as applied. When Article VII, Section 14 is correctly interpreted in accordance with the applicable cannons of construction, its plain and unambiguous language compels the conclusion that absentee votes must be returned and canvassed in the election districts (precincts) in which the absentee voters respectively reside.

To the extent In re Absentee Ballots Case (No.1), 245 A.2d 258 (Pa. 1969) ("Absentee Ballots No. 1") holds otherwise, that decision should be overturned. On multiple levels, Absentee Ballots No. 1 was wrongly decided. The Pennsylvania Supreme Court in Absentee Ballots No. 1 completely disregarded the plain language of Article VII, Section 14, and instead relied upon its own policy-based judgments to effectively substitute its subjective beliefs for the plain language itself. The Court also distorted other cannons of constitutional interpretation by erroneously imposing an unprecedented burden of proof, interjecting the doctrine of laches into the case without acknowledging that the doctrine would not bar a claim for prospective relief, and presupposing that Article VII, Section 14 would yield an absurd result and would be unable to be executed as a practical matter. If Absentee Ballots No. 1. were overruled, the result would not upset any settled expectation or reliance interests; to the contrary, the result would elevate Article VII, Section 14 to its unambiguous meaning and original intent.

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

"An application for summary relief may be granted if a party's right to judgment is clear and no material issues of fact are in dispute." Hosp. & Health System Ass'n of Pa. v. Commonwealth, 77 A.3d 587, 602 (Pa. 2013); see Pa.R.A.P. 1532(b) ("At any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear.").

"[A] statute is presumed to be constitutional and will only be invalidated as unconstitutional if it clearly, palpably, and plainly violates constitutional rights." Commonwealth v. Ludwig, 874 A.2d 623, 628 (Pa. 2005) (internal citations and quotation marks omitted). As the constitutionality of a statute presents a pure question of law, the Court's standard of review is *de novo* and its scope of review is plenary. Commonwealth v. Omar, 981 A.2d 179, 185 (Pa. 2009).

III. QUESTION PRESENTED

Does Article VII, Section 14 require that absentee votes be returned and canvassed at the local election district?

SUGGESTED ANSWER: Yes.

IV. STATEMENT OF THE CASE

Originally, the Pennsylvania Constitution required all qualified electors to cast their votes in-person and submit their ballots at the local election district and

their ballots were also canvassed at their local election district. See Omnibus Brief in Opposition to the Preliminary Objections of All Respondents ("PO Brief"), at p. 4. This method and manner of voting and canvassing was the only way a qualified elector could cast a ballot and have that ballot tabulated in accordance with the Constitution. On two occasions, the Pennsylvania Supreme Court held that absentee voting statutes, without authorization from an express constitutional amendment permitting a manner of voting different from in-person voting, were unconstitutional. See Chase v. Miller, 41 Pa. 403 (Pa. 1862) (holding that the Military Absentee Act of 1839 was unconstitutional because a constitutional amendment was required to o authorize a method and manner of voting different from in-person voting); In re Contested Election of Fifth Ward of Lancaster City, 126 A. 199 (Pa. 1924) (same; with respect to the 1923 Absentee Voting Act); see also McLinko v. Commonwealth, 279 A.3d 539, 564 (Pa. 2022) (holding that, due to the addition of Article VII, Section 4, the Pennsylvania Constitution permitted mail-in voting).

The Pennsylvania Constitution was eventually amended to allow voters to cast ballots via absentee voting. See McLinko, 279 A.3d at 581-82 and n.51. From 1949 until 1967, the pertinent language of the constitutional provision relating to absentee ballots, which then included the term "may," stated as follows:

> The General Assembly may, by general law, provide a manner in which, and the time and place at which, [qualified absentee electors]

> may vote and for the return and canvass of their votes in the election district in which they respectively reside.

See 1949 Pa. Laws 2138 (former Pa. Const. art. VIII, § 18); 1957 Pa. Laws 1019 ("Former Article VIII, Section 19") (emphasis added).

From 1937 to 1967, the Election Code contained two provisions that directed absentee ballots to be returned to and canvassed by county board of election ("Former Election Code Provisions), presumably at the office of the county board of election.[3]

On May 16, 1967, the electorate amended what was then Article VIII, Section 19, into Article VIII, Section 14—now Article VII, Section 14—and replaced the word "may" with the word "shall":

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, [qualified absentee electors] may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

[3]The 1951 version of what is now 25 Pa.Stat. § 3146.6(a), in relevant part, stated as follows:

> [A]t any time after receiving an official absentee ballot . . . the elector shall [complete the absentee ballot] . . . and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 Pa.Stat. § 3146.8(a), formerly the Act of March 6, 1951, 1951 Pa. Laws 3. The 1951 version of what is now 25 Pa.Stat. § 3146.8(a), in relevant part, provided as follows:

> The county boards of election, upon receipt of official absentee ballots . . . shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections.

25 Pa.Stat. § 3146.8(a), formerly the Act of March 6, 1951, 1951 Pa. Laws 3.

Pa. Const. Art. VII, § 14(a) (emphasis added).

In re Absentee Ballots Case (No.2), 245 A.2d 265 (Pa. 1969) ("Absentee Ballots No. 2") (plurality),[4] the Pennsylvania Supreme Court addressed the November 8, 1966 general election and concluded that the Former Election Code Provisions did not violate Former Article VIII, Section 19, which contained the term "may."

In Absentee Ballots No. 1, the Pennsylvania Supreme Court addressed the November 7, 1967 general election and concluded that the Former Election Code Provisions did not violate Article VII, Section 14, which contained—and continues to contain—the term "shall."

In December 1968, the General Assembly, in an apparent response to the new version of Article VII, Section 14, and its usage of the word "shall," enacted legislation providing that local district boards of election receive and canvass absentee ballots in the election districts (not the office of the county boards of election) before returning the absentee ballots to the county board of elections for

[4]In Absentee Ballots No. 2, there were six participating Justices in the case; three Justices concurred in the result of the opinion but did not join the analysis (Jones, J., O'Brien, J., Roberts, J., concurring in the result only), whereas two Justices joined the opinion of the author (Eagan, J. and Bell, C.J., joining Musmanno, J.,), and one Justice (Cohen, J.) took no part. Consequently, the case was decided on a three-to-three basis, and Absentee Ballots No. 2 did not garner a majority of the justices to agree on the legal rationale. Therefore, Absentee Ballots No. 2 is a non-binding plurality decision that has no precedential effect. See Gallagher v. Geico Indem. Co., 201 A.3d 131, 135 n.5 (Pa. 2019) ("[A] plurality opinion . . . does not constitute binding precedent.").

final computation. See Act of Dec. 11, 1968, P.L. 1183, No. 375 (the "1968 Election Code"), repealed and replaced by the Act of October 31, 2019, P.L. 552 ("Act 77").[5]

[5]For example, the General Assembly added the following sections to the Former Election Code, directing that the local district board canvass absentee ballots before returning the absentee ballots to the county board of elections:

> Section 1302.2(c). In addition, the local district boards of election shall, upon canvassing the official absentee ballots under section 1308, examine the voting check list of the election of the election district of said elector's residence and satisfy itself of the election district of said elector's residence and satisfy itself that such elector did not cast any other ballot other than the one properly issued to him under his absentee ballot. In all cases where the examination of the local district board of elections discloses that an elector did vote a ballot other than the one properly issued to him under the absentee ballot application, the local district board of elections shall thereupon cancel said absentee ballot and said elector shall be subject to the penalties as hereinafter set forth.
>
> * * *
>
> Section 1308(e). [T]he local election board shall then further examine the declaration on each envelope not so set aside and shall compare the information thereon with that contained in the [absentee voters' lists and file]. If the local election board is satisfied that the declaration is sufficient ... the local election board shall announce the name of the elector and shall give any watcher present an opportunity to challenge [the absentee vote]. Upon challenge of any absentee elector ... the local election board shall mark "challenged" on the envelope ... and the same shall be set aside for the return to the county board unopened pending decision by the county board and shall not be counted. All absentee ballots not challenged . . . shall be counted and included with the general return of paper ballots or voting machines. ... Thereupon, the local election board shall open the envelope of every unchallenged absentee election .... If any of these envelopes shall contain any extraneous marks or identifying symbols other than the words "Official Absentee Ballot," the envelopes and the ballots contained therein shall be set aside and declared void. The local election board shall then break the seals of such envelopes, remove the ballots and record the votes in the same manner as district election officers are required to record votes. With respect to challenged ballots, they shall be returned to the county board with the returns of the local election district where they shall be placed unopened in secure, safe and sealed container in the custody of the county board until ... a formal hearing of all such challenges ....

Act of Dec. 11, 1968, P.L. 1183, No. 375, repealed by Act 77 (emphasis added). See PO Brief at 7-10 and nn. 4-5 (discussing the features and mechanisms of sections of the Former Election Code related to the receipt and canvass of absentee ballots).

From December 1968 to 2019, a period of over 50 years, the local district boards of election received and canvassed absentee ballots in the local election districts pursuant to the 1968 Election Code. It is undisputed that, during this timeframe, there is no evidence or reason to believe that there were any practical, financial, or administrative problems with the return and canvassing of absentee ballots at the local election districts.

The local district boards of elections continued to canvass absentee ballots in the local election district until the General Assembly enacted Act 77 of 2019, which authorized no-excuse, mail-in voting and deleted all of the provisions of the 1968 Election Code related to the canvassing of absentee ballots. See PO Brief at pp. 11-12 and Exhibit A attached to PO Brief. Two new provisions introduced with Act 77, 25 Pa.Stat. § 3146.6(a) and 25 Pa.Stat. § 3146.8(a), similar to the Former Election Code Provisions, collectively required the county boards of election to receive and canvass both absentee and mail-in ballots at the office of the county boards of election—not in the local election districts. See 25 Pa.Stat. §§ 3146.6(a), 3146.8(a); *supra* note 2 (reproducing pertinent language of statutes).

In its 2024 "Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures," ("Guidance") Section 4.1, Respondent Department of State instructed Respondent County Boards of Elections that "voters must return their own completed absentee or mail-in ballot by 8:00 pm on Election Day to the county board

of elections or other county-designated drop-off location." PO Brief at 12 (quoting PFR Ex. C). At Section 5.2 of that Guidance, Respondent Department of State instructed the Respondent County Boards of Elections that "the county board of elections" should conduct the pre-canvass and canvass procedures. Id. Apparently following the Guidance of Respondent Department of State, Respondent County Boards of Election have instituted practices and policies whereby the county boards of election receive and canvass absentee ballots at the office of the county boards of election. See PFR ¶¶ 55-60.

On January 30, 2024, Petitioners filed the PFR, contending that 25 Pa.Stat. § 3146.6(a), 25 Pa.Stat. § 3146.8(a), and the Guidance, on their face and as applied, contravene Article VII, Section 14.[6] Subsequently, Respondents filed preliminary objections and briefs in support, Petitioners filed the PO Brief in response, and Respondents filed reply briefs. On June 10, 2024, this Court entered a per curiam Order directing the parties to file applications for summary relief no later than

[6]Even if 25 Pa.Stat. § 3146.6(a) and 25 Pa.Stat. § 3146.8(a) and/or the Guidance could be construed in a constitutional manner that does not require absentee ballots to be canvassed at the county board of elections offices, and Respondent County Boards of Election could, consistent with those statutes and Guidance, canvass absentee ballots in the election districts in which the absentee voters reside, Respondent County Boards of Election have instituted practices and policies whereby they return and canvass absentee ballots centrally at the county board of elections offices. Accordingly, in the alternative to a declaration that the statutes and Guidance are unconstitutional on their face, Petitioners are alternatively requesting summary declaratory relief that 25 Pa.Stat. § 3146.6(a), 25 Pa.Stat. § 3146.8(a) and the Guidance are unconstitutional as applied.

Monday, June 24, 2024. As such, Petitioners submit the present Application for Summary Relief.

V. ARGUMENT

A. PETITIONERS ARE ENTITLED TO SUMMARY RELIEF BECAUSE THE PLAIN LANGUAGE OF ARTICLE VII, SECTION 14 REQUIRES THAT ABSENTEE VOTES BE RETURNED AND CANVASSED IN THE LOCAL ELECTION DISTRICT

Petitioners are entitled to summary relief because the plain language of Article VII, Section 14 requires that absentee votes be returned and canvassed in the election districts in which the absentee voters respectively reside. "As an interpretive matter, the polestar of constitutional analysis undertaken by the Court must be the plain language of the constitutional provisions at issue." In re Bruno, 101 A.3d 635, 689 (Pa. 2014). Because the "ultimate touchstone is the actual language of the Constitution itself," Stilp v. Commonwealth, 905 A.2d 918, 939 (Pa. 2006), "[e]very word employed in the constitution is to be expounded in its plain, obvious and commonsense meaning," Commonwealth v. Gaige, 94 Pa. 193 (1880). See Rogers v. Tucker, 279 A.2d 9, 13 (Pa. 1971) ("Where in the Constitution the words are plain . . . they must be given their common or popular meaning, for in that sense, the voters are assumed to have understood them when they adopted the constitution.") (internal citations and alterations omitted). "[W]hen the language of a constitutional provision is clear upon its face, and when standing alone it is fairly susceptible of but one

construction, that construction must be given it." Jubelirer v. Pa. Dep't of State, 859 A.2d 874, 876 (Pa. Cmwlth. 2004) (internal citations and quotation marks omitted).

Indeed, "when the language is plain and unambiguous, it cannot be ignored in favor of what the courts or the advocates of a new plan or a new policy or a new agency zealously or blindly believe is within its spirit." Evans v. West Norriton Twp. Municipal Authority, 87 A.2d 474, 479 (Pa. 1952) (internal citation and quotation marks omitted). "The courts are not at liberty to disregard the plain meaning of words of a Constitution in order to search for some other conjectured intent." O'Connor v. Armstrong, 149 A. 655, 657 (Pa. 1930). To be sure, the courts "have no right to disregard or (unintentionally) erode or distort any provision of the Constitution, especially where, as here, its plain and simple language make its meaning unmistakably clear." Commonwealth v. Russo, 131 A.2d 83, 88 (Pa. 1957); accord, e.g., In re Roca, 173 A.3d 1176, 1186 (Pa. 2017). See Commonwealth ex rel. Mac Callum v. Acke, 308 Pa. 29, 162 A. 159, 160 (Pa. 1932) ("Where the Constitution has expressed its purpose in clear and explicit language, a court cannot delimit the meaning of the words used by reference to a supposed intent which might be evoked from it…."); accord, e.g., Robinson Twp. v. Commonwealth, 83 A.3d 901, 945-946 (Pa. 2013).

The one and only time a court may look behind or beyond the plain language of the Constitution is in the rare event that the language at issue is ambiguous or

conflicts with other language within the Constitution. "Language is 'ambiguous' when it conveys two or more reasonable meanings; or when it is otherwise vague, uncertain or indefinite." Barasch v. Public Utility Commission, 532 A.2d 325, 662 (Pa. 1987). Only in such circumstances, the court may consider the electorate's intent by resorting to factors such as the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.[7]

"In ascertaining the meaning of a word in accordance with its common and approved usage, this Court has found it helpful to consult dictionaries." McLinko, 279 A.3d at 577; see Commonwealth v. Gamby, 283 A.3d 298, 307 (Pa. 2022) ("To discern the [] meaning of words and phrases, our Court has on numerous occasions engaged in an examination of dictionary definitions."). Here, the plain and unambiguous language of Article VII, Section 14 unconditionally dictates that the General Assembly "shall" enact legislation that accomplishes both of two separate

[7]See PEDF v. Commonwealth, 161 A.3d 911, 929-30 (Pa. 2017) ("As with our interpretation of statutes, if the language of a constitutional provision is unclear, we may be informed by 'the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.'"); Robinson Twp., 83 A.3d at 945-946 ("If, in the process of undertaking explication of a provision of the Pennsylvania Constitution, any ambiguity, conflict, or inconsistency becomes apparent in the plain language of the provision, [the courts] follow rules of interpretation similar to those generally applicable when construing statutes. . . . If the words of a constitutional provision are not explicit, we may resort to considerations other than the plain language to discern intent, including, in this context, the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.") (internal citations omitted).

objectives: (1) provide a manner for absentee voting for the enumerated individuals, and (2) provide a manner for absentee votes to be returned and canvassed in the election district in which the absentee voter resides. See Oberneder v. Link Computer Corp., 696 A.2d 148, 150 (Pa. 1997) ("By definition, 'shall' is mandatory."). The final clause in Article VII, Section 14 requires that all absentee ballots must be submitted to ("returned") and reviewed/counted ("canvassed") in the local polling place or precinct ("election district") in which the absentee voters reside. See MIRRIAM-WEBSTER ONLINE DICTIONARY (defining "return" to mean "to bring, send, or put back to a former or proper place"); id. (defining "canvass" as the process "to examine (votes) officially for authenticity"); see also 25 Pa.Stat. § 2602(a.1) ("The word 'canvass' shall mean the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots."). Pursuant to Article VII, Section 14, every absentee ballot must be returned to and canvassed "in the election district in which [the absentee voters] respectively reside." Pa. Const. Art. VII, § 14(a) (emphasis added). See MIRRIAM-WEBSTER DICTIONARY (defining "in," when used as a preposition, "as a function word to indicate inclusion, location, or position within limits").

According to its clear meaning, Article VII, Section 14 mandates that absentee ballots must be returned and reviewed/canvassed (but not necessarily adjudicated in all their legal aspects) in the election districts in which the absentee voters

respectively reside. This natural and plain language reading is strongly reinforced by the electorate's obvious intent in amending the constitutional proviso to replace the term "may" with the word "shall," thereby affirmatively requiring the Legislature to pass legislation providing for the return and review/canvass of absentee ballots in the local election district. See McLinko, 279 A.3d at 581 n.51 (noting that "[i]n 1968, the directory 'may' became the mandatory 'shall' that continues to appear in Section 14" and suggesting that courts must not "ignore the mandatory connotation usually attributed to the word 'shall'").

While "may" is directory and permissive, "shall" is mandatory and obligatory. See Lorino v. Workers' Comp. Appeal Bd., 266 A.3d 487, 493 (Pa. 2021) ("The term 'shall' establishes a mandatory duty, whereas the term 'may' connotates an act that is permissive, but not mandated or required."). With regard to legislative discretion in implementing a constitutional directive, the legislature is completely free to (but need not) exercise power that is granted to it by the permissive "may." See 10 P.L.E. CONSTITUTIONAL LAW § 28 (2023) ("[W]hen a constitutional provision contemplates the enactment of implementing legislation, the provision should, absent clear language to the contrary, be interpreted as establishing general guidelines for the forthcoming legislation, rather than mandatory directives as to its content."). However, when the constitution grants legislative power with the mandatory "shall," the legislature has no discretion and must exercise that power by

completing all the objectives that are enumerated within that grant of power. See 10 P.L.E. CONSTITUTIONAL LAW § 28 (2023) ("The word 'shall' in a provision of the Constitution is mandatory, not directory . . . The Legislature is bound and concluded by the mandatory provisions of the Constitution, and is under an obligation to perform the duties and discharge the functions imposed upon it by the Constitution in accordance with its mandate."); see also McLinko, 279 A.3d at 594 (Wecht, J., concurring) (noting that "the Constitution was amended several times to permit—but not to require— the General Assembly to provide a means of absentee voting," and appreciating the legal significance when the people of Pennsylvania "amended the operative verb in Section 14 from the permissive 'may' to the obligatory 'shall,'" because the change in language vested the General Assembly with an affirmative duty to implement absentee voting in a manner consistent with the term "shall").

Former Article VIII, Section 19, which contained the permissive term "may," granted the Legislature the power but not the duty to enact legislation providing a manner for absentee voting for certain enumerated individuals. Former Article VIII, Section 19, did not require that, if the Legislature exercised that power, the Legislature must also provide a manner for each absentee vote to be returned and reviewed/canvassed in the election district in which the absentee voter resided. In other words, because of the permissive word "may" in Former Article VIII, Section

19, the second "and" in the language of the third clause was rendered several or permissive (one or two or both). See Weinberg v. Waystar, Inc., 294 A.3d 1039, 1045-46 (Del. 2023) (stating that "'and' may be used in the joint or several sense," and explaining that "[t]he several 'and' denotes A and B, jointly or severally").

On the other hand, Article VII, Section 14, as a result of the change from "may" to "shall," not only granted the Legislature with power to enact legislation, but also imposed the duty to enact legislation (1) providing a manner for absentee voting for certain enumerated individuals and, further, (2) providing a manner for each absentee vote to be returned and canvassed in the election district in which the absentee voter resided. Stated differently, the "shall" in Article VII, Section made the second "and" in the language of the third clause joint and mandatory (*i.e.*, both one and two). See Weinberg, 294 A.3d at 1046 (explaining that "[t]he joint 'and' denotes A and B, jointly but not severally).

In discussing the several and joint meanings of the word "and" in the context where it is preceded by "may" or "shall" language, the Delaware Supreme Court persuasively explained as follows:

> [A]lthough some scholars maintain that "the meaning of and is usually several," it is, at least, commonplace. This is especially true in permissive sentences and aligns with our understanding of common, ordinary usage. For example, if the litigants went to a breakfast meeting and the host said, "You may have a yogurt, a muffin, and a bagel," the litigants would understand that they may take any of the food items, all of the food items, or none of the food items. In the same situation, albeit with a more demanding host, if the litigants were told, "You must take

> a yogurt, a muffin, and a bagel," they would understand that they must take all three food items.

Weinberg, 294 A.3d at 1058. See also Mason v. Range Res.-Appalachia LLC, 120 F. Supp. 3d 425, 445 (W.D. Pa. 2015) (court persuasively explained that authorities agree that "and" has a several sense as well as a joint sense and that, when the word "and" is used in a permissive sentence, it is most likely to be used in its several sense).

Under a plain language analysis, while the "may" in Former Article VIII, Section 19 did not require the Legislature to enact legislation providing "for the return and canvass of [absentee] votes in the election district in which [the voters] respectively reside," the "shall" in Article VII, Section 14 absolutely requires the Legislature to enact legislation providing "for the return and canvass of [absentee] votes in the election district in which [the voters] respectively reside." When the electorate changed the word "may" to "shall" in the current Article VII, Section 14, the electorate altered the "and" that preceded "for the return and canvass" from its former (and more typical) several or permissive sense ("may") that was located in Former Article VIII, Section 19. The term "shall" in Article VII, Section 14 changed the context of that "and" in Former Article VIII, Section 19, such that the same "and" in Article VII, Section 14 now has a joint or mandatory meaning with respect to requiring the Legislature to provide for both: (1) a manner, time, and place for absentee voting and (2) the return and review/canvass of absentee ballots in the

election district in which the absentee voters resided—and not just the first without the second, or neither the first nor the second, at the sole discretion of the Legislature, as was the case with Former Article VIII, Section 19.[8]

Because there is no ambiguity surrounding the shift from "may" to "shall" in 1967, Article VII, Section 14 must be applied in light and consideration of—and in accordance with— that "shall." See In re Canvass of Absentee Ballots of November 4, 2003 General Election, 843 A.2d 1223, 1231-32 (Pa. 2004) ("Although some contexts may leave the precise meaning of the word 'shall' in doubt . . . this Court has repeatedly recognized the unambiguous meaning of the word in most contexts."); see also In re 2020 Canvass, 241 A.3d at 1079, 1087 (Wecht, J., concurring and dissenting) ("[The date] requirement is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature

[8]Respondent Allegheny, Bucks, Chester, Delaware, Montogomery, and Philadelphia Counties contend that former Article VIII, Section 19, containing the "may" word, "was not offering a menu of breakfast options; it was authorizing the legislature to provide for an absentee-voting regime (or not) and then specifying the features that any such regime must have." (Br. Support of Prel. Obj. at 15, n.6). However, this reading erroneously presupposes that the act of casting an absentee vote is the same as the act of returning and canvassing that vote. Because former Article VIII, Section 19 did not require the Legislature to create a manner and mode for qualified absentee electors to cast a vote at all, former Article VIII, Section 19 could not require the Legislature to devise a mechanism where the absentee votes were returned and canvassed "in the election district in which [the absentee voters] respectively reside." In other words, under former Article VIII, Section 19, the Legislature could enact a law authorizing the return and canvass of absentee votes in the central board of elections offices because the verb "provide" has two separate objects: that is, the first clause ("a manner in which, and the time and pace at which [absentee voters] may vote") functions independently of the second clause ("for the return and canvass of their votes in the election district in which they respectively reside"), and the first can be accomplished without necessarily accomplishing the second.

intended that courts should construe its mandatory language as directory. . . . That reasonable arguments may be mounted for and against a mandatory reading only illustrates precisely why we have no business doing so."); id. at 1090 (Dougherty, J., joined by Saylor, C.J., and Mundy, J., concurring and dissenting) ("[T]he meaning of the terms 'date' and 'sign' ... are self evident, they are not subject to interpretation, and the statutory language expressly requires that the elector provide them. . . . In my opinion, there is an unquestionable purpose behind requiring electors to date and sign the declaration.").

Recognizing that Article VII, Section 14 requires that absentee votes be returned and canvassed in the local election district does not result in an "absurd" situation where the amendment cannot be executed or implemented in practical reality. In fact, pursuant to the 1968 Election Code, which was passed on the heels of Article VII, Section 14, absentee ballots were received and reviewed/canvassed at the local election district, without incident, for over 50 years. See *supra* note 5 and accompanying text.

B. ABSENTEE BALLOTS NO. 1 SHOULD BE OVERTURNED

This straightforward analysis of plain and unambiguous language should suffice to resolve this case with the Court declaring that 25 Pa.Stat. § 3146.6(a), 25 Pa.Stat. § 3146.8(a), and the Guidance are unconstitutional on their face and/or as applied by Respondent County Boards of Election. However, in 1969, the Supreme

Court issued Absentee Ballots No. 1, which interpreted Article VII, Section VII and concluded that the Former Election Code Provisions did not violate Article VII, Section 14 because Article VII, Section 14 did not command that absentee ballot had to be returned and canvassed in the local election district. Although this Court is bound by Absentee Ballots No. 1, that should be overruled by the Pennsylvania Supreme Court. See Zauflik v. Pennsbury School Dist., 72 A.3d 773, 797 (Pa. Cmwlth. 2013) ("[W]e, as an intermediate appellate court are bound by the decisions of the Pennsylvania Supreme Court and are powerless to rule that decisions of that Court are wrongly decided and should be overturned.").[9] Absentee Ballots No. 1 is baseless and without foundation in the law, contradicts the plain and clear language of Article VII, Section 14, and stands as an anomaly in distorting various constitutional cannons of interpretation throughout its opinion.

"[I]t is the duty of the courts to invalidate legislative action repugnant to the constitution." Zemprelli v. Daniels, 256, 436 A.2d 1165, 1169 (Pa. 1981). "While the doctrine of stare decisis is important, it does not demand unseeing allegiance to things past," Commonwealth v. Doughty, 126 A.3d 951, 955 (Pa. 2015), and "the

[9]Although this Court lacks the power to overrule Absentee Ballots No. 1, it should acknowledge the merits of Petitioners' arguments and invite the Pennsylvania Supreme Court to revisit its precedent. See Buckwalter v. Borough of Phoenixville, 940 A.2d 617, 624 n. 18 (Pa. Cmwlth. 2008) (wherein the Commonwealth Court acknowledged the "appeal and logic" of the appellant's arguments and invited the Pennsylvania Supreme Court to revisit its precedent). The Pennsylvania Supreme Court accepted that invitation and overruled Baldwin v. City of Philadelphia, 99 Pa. 164 (1881) in Buckwalter v. Borough of Phoenixville, 985 A.2d 728, 733 (Pa. 2009).

Court's general faithfulness to precedent is not sufficient justification to buttress judicial decisions proven wrong in principle." Tincher v. Omega Flex, Inc., 104 A.3d 328, 352 (Pa. 2014); see Olin Mathieson Chem. Corp. v. White Cross Stores, Inc., No. 6, 199 A.2d 266, 268 (Pa. 1964) ("[T]he courts should not perpetrate error solely for the reason that a previous decision although erroneous, has been rendered on a given question."); Stilp v. Commonwealth, 905 A.2d 918, 967 (Pa. 2006) ("While stare decisis serves invaluable and salutary principles, it is not an inexorable command to be followed blindly when such adherence leads to perpetuating error."). "Surely, the orderly development of the law must be responsive to new conditions and to the persuasion of superior reasoning." Estate of Grossman, 406 A.2d 726, 731 (Pa. 1979). "Although this Court adheres to the principle of stare decisis, it will not be bound by a decision that in itself is clearly contrary to the body of the law." Lewis v. Workers' Comp. Appeal Bd. (Giles & Ransome, Inc.), 919 A.2d 922, 928 (Pa. 2007). Notably, this "is a constitutional case, and stare decisis is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." Commonwealth v. Alexander, 243 A. 3d 177, 197 (Pa. 2020) (internal citation omitted); Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 850 (Pa. 2024) ("Stare decisis is at its weakest in the context of constitutional interpretation.").

"Furthermore, in circumstances where prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language, engagement and adjustment of precedent as a prudential matter is fairly implicated and salutary." Robinson Twp. v. Commonwealth, 83 A.3d 901, 946 (Pa. 2013). "When precedent is examined in the light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function." Ayala v. Philadelphia Board of Public Education, 305 A.2d 877, 886-87 (Pa. 1973) (internal citation omitted).

> It has been said that it is sometimes more important that an issue "be settled than that it be settled right." But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to endure through a long lapse of ages,"—we place a high value on having the matter "settled right."

Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 264 (2022) (internal citations omitted). The Pennsylvania Supreme Court will overrule a decision when the quality of its reasoning is "patently flawed," the decision "has not been approvingly cited or applied by [the Supreme Court]," and reliance interest are not at stake. See Allegheny Reprod. Health Ctr., 309 A.3d at 883-89 (discussing applying stare decisis factors when deciding to overrule precedent).

Absentee Ballots No. 1 is patently flawed. In Absentee Ballots No. 1, the Supreme Court considered the situation where the absentee votes were pivotal in the

outcome of the race for three seats on the board of commissioners for Lackawanna County in the November 7, 1967 general election, and the petitioners sought to nullify all of the absentee votes after the ballots were cast and canvassed. The petitioners in Absentee Ballots No. 1 challenged the Former Election Code Provisions under what had very recently become Article VII, Section 14 of the Pennsylvania Constitution, contending that Article VII, Section 14 required that absentee ballots be received and canvassed at the local election district. Ultimately, the Supreme Court concluded that the absentee ballots could be tabulated on a county-wide basis, rather than in the local election districts.

The Pennsylvania Supreme Court in Absentee Ballots No. 1 discussed four factors in reaching its holding, and Petitioners will address each of them in turn. First, the Pennsylvania Supreme Court in Absentee Ballots No. 1 focused on the fact that, from 1937 to 1967 (30 years), the Former Election Code Provisions provided that absentee ballots were to be canvassed by the county board of elections and that, during that time period, no one challenged the practice as unconstitutional. The Court viewed the lack of a constitutional challenge to the statute as evidence "that the lawmakers of the state are satisfied it conforms to the Constitution," and given the numerous times the General Assembly has revised the Election Code, "if the county canvassing of absentee ballots were as a flagrant a violation of the Constitution as appellants contend, the Legislature would have noted this, and made

the demanding correction." 245 A.2d at 261. For this reason, the Court framed the issue as one of determining whether the asserted constitutional violation was "monumentally wrong." Id. In this analysis, the Pennsylvania Supreme Court failed to consider that, for that entire prior 30 year time period, Article VIII, Section 19 contained the permissive "may" language, and the newly adopted Article VII, Section 14, changed "may" to "shall." The Pennsylvania Supreme Court did not analyze the several and joint meanings of the word "and" in the context where it is preceded by "may" or "shall" language. Strangely, the Court gave no consideration to the change from "may" to "shall" in its analysis despite recognizing the important difference between "may" and "shall" constitutional language in the plurality opinion in Absentee Ballots No. 2.[10]

In addition, it is one thing for a court to set forth the correct standard of review as requiring a "a party challenging a statute must meet the high burden of

[10]The Court in Absentee Ballots No. 2 stated:

> The provision of the Constitution under discussion provides that "The Legislature may by general law provide a manner . . . for the return and canvass of their votes in the election district in which they respectively reside." In interpreting language of this character, the illustrious Chief Justice Gibson of this Court said: "A constitution is not to receive a technical construction, like a common-law instrument or a statute. It is to be interpreted so as to carry out the great principles of government, not to defeat them; and to that end [constitutional] commands as to the time or manner of performing an act are to be considered as merely directory whenever it is not said that the act shall be performed at the time, or in the manner prescribed, and no other." Com. v. Clark, 7 W. & S. 127.

Absentee Ballots No. 2, 245 A.2d at 267 (emphasis added; emphasis in original omitted).

demonstrating that the statute clearly, palpably, and plainly violates the Constitution." In re J.B., 107 A.3d 1, 14 (Pa. 2014). It is a completely different thing altogether for a court to elevate that already high standard, based on a statute's perceived longevity, and demand that the challenging party, in addition to demonstrating a clear and plain violation of the Constitution, to show that the violation, in and of itself, was of such a magnitude that it could be said to have resulted in a "monumental wrong."

Later in the opinion, the Pennsylvania Supreme Court suggested that the petitioners could not meet their burden of proof because the petitioners did not claim that the absentee ballots "were illegally marked, cast or counted," or "that they were the victims of fraud, or even mistake." The Pennsylvania Supreme Court characterized the petitioners as seeking to invalidate numerous absentee votes "because, in effect, the counters of the votes sat in a brick and stone courthouse instead of a garage, schoolhouse, or empty building as they counted ballots." Id. at 262.

Second, after setting forth and then applying an incorrect standard to review constitutional challenges to statutes, the Pennsylvania Supreme Court in Absentee Ballots No. 1 proceeded to place overwhelming significance on "the paramount rights of the voters," noting that the petitioners, if successful, "would nullify the votes of 5,506 civilians," and this would amount to "mass disfranchisement,"

necessitating a showing of "grave constitutional infirmities." Id. at 262. The Court continued that, in the context of the case, "[t]he disfranchisement of 5,506 citizens for following a procedure laid down by the election authorities would be unconscionable." Id. Similarly, in Kelly v. Commonwealth, 240 A. 3d 1255, 1257 (Pa. 2020), the Pennsylvania Supreme Court dismissed a petition for review because of petitioners "failure to institute promptly a facial challenge to the mail-in voting statutory scheme" and relief would have resulted "in the disenfranchisement of millions of Pennsylvania voters"); see also id. at 1257-28 (Wecht, J., concurring) ("In the context of a challenge to the results of an election, [] due consideration must [] be accorded to the rights of those voters who cast ballots in good faith reliance upon the laws passed by their elected representatives.") (citing Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 243 (6th Cir. 2011) ("To disenfranchise citizens whose only error was relying on [state] instructions ... [is] fundamentally unfair."). By contrast, Petitioners here are not attempting to invalidate even a single vote and seek only prospective relief.

Third, without any apparent support from an evidentiary record, the Pennsylvania Supreme Court stated:

> As we study the objective realities of county-wide canvassing of votes, we are led inevitably to the conclusion that the framers of the controverted constitutional amendment never intended that the actual counting of the absentee ballots was to be performed in the local districts as against the more-convenient, expeditious, business-like operation of having them tabulated on a county-wide basis.

Id. at 263. The Court noted that "Lackawanna County has 243 election districts," and "the reasoning of the [petitioners] would require . . . the distribution of absentee ballots to some 243 election districts [and] special arrangements for the opening, challenging, counting, and tabulating of these ballots in each of these 243 separate places." Id. According to the Court, "[t]his in itself would create chaotic and highly disruptive situations," and "[t]o require hearings in 243 separate places when the job can more effectively be done in one, could only lead to absurd consequences." Id.

Without first applying a plain language analysis of Article VII, Section 14, it was improper for the Pennsylvania Supreme Court to proceed directly to what has been referred to as the "absurdity cannon" of constitutional interpretation, which provides that "[t]he Constitution . . . should not be construed so as to lead to impracticable and unreasonable results or absurd consequences." 10 P.L.E. CONSTITUTIONAL LAW § 21 (2023). This precept of constitutional interpretation can only be employed when the language at issue is ambiguous. The language of Article VII, Section 14 at issue here is clear and unambiguous.

In any event, the Pennsylvania Supreme Court's prediction did not age well, because within the same year the Legislature did what the Court thought was too absurd to do and required by statute that absentee ballots be canvassed in the local election districts. See *supra* note 5; PO Brief at pp. 7-10. That requirement failed to

yield the absurd consequences that the Court predicted and remained in effect for more than 50 years thereafter.

Fourth, and last and least, the Supreme Court attempted to construe Article VII, Section 14 and concluded "that what the Constitution aims at is the counting of each vote not by the local elections district but in such a manner that the computation appears on the return in the district where it belongs." Id. at 264 (emphasis added). The Court determined that Article VII, Section 14 was constitutional because "[t]he county board of elections tallied the absentee votes and applied the tallies to the districts in which the absentee voters respectively resided." Id.

However, the Court did not engage in any meaningful textual analysis of the actual language of Article VII, Section 14 and, instead, focused on the general and abstract "spirit," "intent," or "aim" of the provision. That was a fundamental misapplication of the rules of constitutional construction because courts cannot ignore the plain language in search of some broader, speculative, and perceived intent of what the electorate meant when it was not plainly stated in the words at issue.

In arriving at its conclusion, the Pennsylvania Supreme Court in Absentee Ballots No. 1 did not give due and proper consideration to the terms "return and canvass," such as by examining any dictionary or statutory definitions of those terms as this Brief does on pages 13-20, *supra*. See Commonwealth v. McCoy, 962 A.2d

1160, 1168 (Pa. 2009) ("We are not permitted to ignore the language of a statute, nor may we deem any language to be superfluous."). Simply ascribing vote totals to a precinct is not the same as "returning and canvassing" those votes in that precinct. If the county election office is the place where absentee ballots are returned and gathered after the final pre-canvass meeting, examined officially for authenticity, and counted--where the votes reflected thereon are computed and tallied, then the county election office is where the absentee votes are "returned and canvassed."

Moreover, to support its interpretation, the Court in Absentee Ballots No. 1 relied exclusively on the New Jersey Supreme Court's decision in Miller v. Montclair, 108 A. 131 (N.J. 1919). However, in Miller, the court was predominately concerned with the issue of which governmental body, local versus county, should canvass the absentee votes after they were submitted to the secretary of state, and not the place in which the votes were to be reviewed/canvassed. While in *dicta* the court stated that the general "aim" was to have votes counted so the votes "appear on the return in the district where it belongs," the court highlighted that, based on the pertinent constitutional language, the legislature possessed discretion to pick and choose which governmental entity should "open and count the votes." Id. at 134.[11] When read in its proper context, this is the full extent of the holding of and

[11]In this respect the New Jersey Constitution operated in an identical fashion to former Section VIII, Section 19 and its embodiment of the term "may." See PO Brief at 32-33.

proposition for which Miller stands for, and it lends no support to the analysis in Absentee Ballots No. 1. Indeed, even the Miller court determined that "if the constitution means that actual counting should be done in the election district, the county board may attend there for that purpose," but, given the leeway that the constitution afforded the legislature, the court fell short of holding that the constitution definitively imposed such a requirement. Here, by contrast, Article VII, Section 14 imposes such a requirement.

In its 55-year history, Absentee Ballots No. 1 has not been cited approvingly by the courts but, instead, has only been cited for secondary or collateral principles of law; aside from Absentee Ballots No. 2 (plurality), Absentee Ballots No. 1 has never been applied, relied upon, or reaffirmed by a court; and Absentee Ballots No. 1 has not generated a body of constitutional jurisprudence or support through subsequent legislative activity. Finally, if Absentee Ballots No. 1 were overruled, the result would not upset the expectation or reliance interests of the electors or the Respondent County Boards of Election. Instead, the electors would simply continue to cast absentee ballots as they have in the past, and Respondent County Boards of Election would merely relinquish pre-canvassing activity to the local election district, in future elections, just as it previously did for over 50 years when the 1968 Election Code was effective. Accordingly, Absentee Ballots No. 1 should be overturned and Petitioners' Application for Summary Relief should be granted.

C. PETITIONERS HAVE STANDING TO PURSUE AND MAINTAIN THIS ACTION

Similar to their Preliminary Objections, Petitioners anticipate that Respondents will file applications for summary relief arguing that Petitioners lack standing to commence and pursue this suit. Petitioners incorporate their discussion on the standing issue from their Omnibus Brief in Opposition to Respondents' Preliminary Objections. See PO Brief at pp. 14-22. "It seems nearly self-evident that a candidate who runs the risk of defeat because of the casting of ballots that are the product of an extra-constitutional statute has standing to challenge that statute." Albence v. Higgin, 295 A.3d 1065, 1087-1088 (Del. 2022). If the Court were to rule that Petitioners lack standing until the County Boards of Election actually canvass and tabulate the absentee ballots against them and it changes the outcome of an election, such a candidate would have only two days to file an appeal from the decision of the relevant County Board(s) of Elections, and the courts would have to convene an evidentiary hearing within three days thereafter, not to mention any expedited appeal that could subsequently follow. See 25 Pa.Stat. § 3157 (outlining the process by which to appeal and have that appeal adjudicated from canvassing decisions made by a county board of elections). Every candidate would need to expend funds, just in case, in advance, to prepare for the possibility of an election result close enough that the candidate might chose to raise the constitutional issue

raised in this case, so that the candidate would be able to quickly file appeals in the short time available, if it becomes necessary.

Respondents argue that more harm than that is required for standing and that, for standing to be recognized, the unconstitutional procedure has to be more expensive and/or yield less reliable results than a constitutional procedure would yield. But in doing so, Respondents are challenging the policy justifications for the constitutionally-mandated approach. A litigant does not need to show that the constitutional approach is functionally preferable from a policy perspective in order to have standing. To have standing, a petitioner only need to show that the constitutional violation has harmful impact, not that there are no benefits or that the suggested benefits do not outweigh the harms. No such standing arguments have any support in the caselaw. This Court should decline to be the first to hold that a litigant challenging an unconstitutional law or practice has no standing because the litigant will be better off, on balance, in the court's view, if the unconstitutional law or practice is allowed to continue. For the purposes of analyzing standing, of course the Court must presume that the constitutional challenge has merit.

It is far preferable from all perspectives to have these constitutional issues litigated prospectively rather than in the context of a defeated candidate seeking to invalidate absentee votes in a highly compressed time frame, holding up the final results of an elections in the process. The burden on the litigants and the courts in

that context would be far worse, and it would require invalidating votes to provide retrospective relief.

VI. CONCLUSION

For the aforementioned reasons, Petitioners respectfully urge this Court to grant their Application for Summary Relief.

Dated: June 24, 2024

Respectfully submitted,

/s/ Gregory H. Teufel
Gregory H. Teufel
Adam G. Locke
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 127(a) of the Pennsylvania Rules of Appellate Procedure, I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Filed: June 24, 2024

/s/ Gregory H. Teufel
Gregory H. Teufel

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief contains 9,556 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

Filed: June 24, 2024

/s/ Gregory H. Teufel
Gregory H. Teufel

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 33 M.D. 2024

DAVID H. ZIMMERMAN and KATHY L. RAPP,

Petitioners,

v.

AL SCHMIDT, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, the COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, *et al.*,

Respondents.

PETITIONERS' APPLICATION FOR SUMMARY RELIEF

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVID H. ZIMMERMAN and KATHY L. RAPP,	:	
	:	No. 33 M.D. 2024
Petitioners,	:	
v.	:	
AL SCHMIDT, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, *et. al.*,	:	
Respondents.	:	

PETITIONERS' APPLICATION FOR SUMMARY RELIEF

Pursuant to Pennsylvania Rules of Appellate Procedure 123 and 1532(b), Petitioners David H. Zimmerman and Kathy L. Rapp ("Petitioners") file this Application for Summary Relief, requesting that this Court enter summary relief granting Petitioners' claims for declaratory and injunctive relief, and in support thereof, aver as follows:

1. Petitioners filed a Petition for Review seeking declaratory and injunctive relief, contending that 25 Pa. Stat. § 3146.6(a), 25 Pa. Stat. § 3146.8(a), and the Guidance issued by the Respondent Department of State, as applied by Respondent County Boards of Election, contravene Article VII, Section 14.

2. The plain language of Article VII, Section 14 compels the conclusion that absentee ballots must be returned and reviewed/canvassed in the election districts (precincts) in which the absentee voters respectively reside.

3. However, Respondent County Boards of Election have instituted policies and practices whereby absentee ballots must be returned and reviewed/canvassed at the office of the county board of elections and not the local election district.

4. There are no material factual disputes in this matter.

5. Petitioners are entitled to summary relief because the claims are meritorious as a matter of law.

6. In support of this Application for Summary Relief, Petitioners rely on the contemporaneously filed Brief in Support.

7. By way of reference, Petitioners incorporate their Petition for Review and their Omnibus Brief in Opposition to the Preliminary Objections of all Respondents.

WHEREFORE, Petitioners respectfully request that this Court grant this Application for Summary Relief and enter summary relief in favor of Petitioners on their claims for declaratory and injunctive relief.

Filed: June 24, 2024

Respectfully submitted,

/s/ Gregory H. Teufel
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVID H. ZIMMERMAN and KATHY L. RAPP,	:	
	:	No. 33 M.D. 2024
Petitioners,	:	
v.	:	
AL SCHMIDT, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, *et. al.*,	:	
Respondents.	:	

[PROPOSED] ORDER GRANTING PETITIONERS' EMERGENCY APPLICATION FOR PEREMPTORY JUDGMENT AND SUMMARY RELIEF

NOW, this _____ day of _____ 2024, upon consideration of Petitioners' Application for Summary Relief, and any response thereto, it is hereby ORDERED that:

1. Petitioners' Application is GRANTED; and

2. It is DECLARED that 25 Pa.Stat. § 3146.6(a), 25 Pa.Stat. § 3146.8(a) ("Statutes"), and the Guidance of Respondent Department of State ("Guidance"), as applied by Respondent County Boards of Elections, violate Article VII, Section 14 of the Pennsylvania Constitution.

3. Respondents are hereby ENJOINED from enforcing the Statutes and/or Guidance or any other statutes or guidance in a manner to cause Respondent County

Boards of Election canvass absentee ballots in a place other than the local election district where the absentee voters respectively reside.

4. Respondent County Boards of Elections are ENJOINED from canvassing absentee ballots at the county boards of elections or anywhere other than in the election districts in which the absentee voters respectively reside;

5. This ORDER will take effect immediately and will continue in force up until and after the General Election in November 2024.

_____

, J.

CERTIFICATION OF COMPLIANCE

Pursuant to Rule 127(a) of the Pennsylvania Rules of Appellate Procedure, I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Filed: June 24, 2024

/s/ Gregory H. Teufel
Gregory H. Teufel